

COVID-19 Update: Changes in Face Covering Guidance and Considerations for Employers on Implementing a Vaccination Mandate

Heather Becker, Amber Lukowicz and Alexandra McNicholas

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As we enter our seventeenth month of the COVID-19 pandemic, fears that the pandemic is once again getting out of control continue to rise. With COVID-19 cases increasing across the country, due in part to the contagiousness of the Delta variant, there has been a shift in recommendations for the use of face coverings. The Centers for Disease Control and Prevention (CDC) recently revised its position that fully vaccinated persons do not need to wear masks in most indoor or outdoor settings. Now, the latest guidance is that all persons – including fully vaccinated persons – should resume wearing masks in public indoor spaces in parts of the country where the virus is surging. To determine where a virus is surging, the CDC looks at 50 new infections per 100,000 residents over the prior seven-day period, or where 8% of tests are positive in the same period. Employers should closely monitor the **CDC's COVID Data Tracker** for updates on whether an area is low, moderate, substantial or high risk of transmission based on current data, which may affect the state or local recommendations or requirements for masking, even for fully vaccinated persons.

In response to the CDC's shift in its guidance on face coverings, some states have enacted new face covering requirements, including Illinois, where Governor Pritzker issued an order requiring anyone who enters a state building to wear a face mask, regardless of their vaccination status. At the local level, in the City of Chicago, for example, Mayor Lightfoot and the

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Heather R. Becker

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Chicago Department of Public Health are recommending masks for everyone over the age of two in public indoor settings. This recommendation follows Cook County being added to the list of areas with substantial COVID-19 transmission by the CDC.

The increase in COVID-19 cases across the country has also reinvigorated the debate as to what employers can and should do to help combat the pandemic, including whether they should be mandating their employees to become fully vaccinated. The U.S. Food and Drug Administration's (FDA) approval of the first vaccine in December 2020 under its Emergency Use Authorization (EUA) was met with mostly positive sentiment that an end to the pandemic – or at least more control over the pandemic – was in sight. While still pending full FDA approval, the EUA signifies that the known and potential benefits of the vaccines outweigh the known and potential risks. Applications have been submitted for two of the three vaccines – Pfizer and Moderna – to obtain full FDA approval. While it is unknown exactly when full FDA approval will be granted, some experts predict that it could be as early as the Fall of 2021.

While no vaccine is 100% effective, studies looking at how the COVID-19 vaccines are working in real-world conditions show that these vaccines have been an important tool in combating the pandemic. The vaccines help protect people from getting sick or severely ill with COVID-19. The vaccines also reduce the spread of the disease overall, helping to protect others in the community. The initial steady increase in vaccination rates led to a decrease in COVID-19 cases and allowed for a loosening of restrictions on masking and social distancing, which was a welcomed reprieve for employers who are ready for their employees to return to an office setting and work-related travel. Despite the positive data on the effectiveness of the vaccines, demand for vaccination has leveled off with just under 50% of the total U.S. population (and about 60% of all adults) being fully vaccinated. Given the effectiveness of the vaccines and the desire to return workplaces to “normal,” many employers are considering whether to mandate that their employees receive the COVID-19 vaccine.

With respect to vaccine mandates, the initial debate centered on whether an employer can legally mandate that its employees obtain the COVID-19 vaccine. The U.S. Equal Employment Opportunity Commission (EEOC) has taken the position that EEO laws do not prohibit employers from instituting mandatory vaccination policies for all employees physically entering the workplace, but exceptions must be made to reasonably accommodate individuals who, because of a disability or a sincerely held religious belief, practice or observance, do not get vaccinated, unless providing an accommodation would pose an undue hardship on the operations of the employer's business. Examples of possible reasonable accommodations include requiring the employee to wear a face mask, work at a social distance from others, work a modified shift, take periodic tests for COVID-19 or be given the opportunity to work from home.

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Most recently, on July 26, 2021, the U.S. Department of Justice (DOJ) published **new guidance** issued by the DOJ's Office of Legal Counsel on July 6, 2021, on mandating COVID-19 vaccinations and EUA vaccine requirements by public and private entities. The DOJ's opinion concludes that "federal law does not prohibit public or private entities from imposing vaccination requirements for vaccines that are subject to emergency use authorizations from the U.S. Food and Drug Administration." Specifically, Section 564 of the Food, Drug, and Cosmetics Act (FDCA) states that the FDA, when approving an EUA, "to the extent practicable," must impose appropriate conditions on the EUA, including that recipients of the EUA product "are informed" of "the option to accept or refuse administration of the product." To satisfy this requirement, the FDA, when approving the EUAs for the COVID-19 vaccines, required that the recipient receive a Fact Sheet. The DOJ opinion noted that allowing public and private entities to require the vaccines was not prohibited under the FDCA's EUA provisions because the individual still has the option to refuse the vaccination but will simply have to face the consequences of refusal, which may include finding new employment. Although a DOJ written opinion is not binding on entities or the courts, it does provide additional support for employers who wish to mandate vaccination.

The DOJ opinion seems to be consistent with decisions from the federal courts in recent legal challenges to employer-mandated vaccine programs. For example, in *Legaretta v. Macias*, a detention center employee filed a federal court lawsuit in New Mexico against his employer challenging a mandatory vaccine policy based on the EUA, arguing that an unapproved vaccine cannot be mandatory. While the employee's motion for a preliminary injunction has been denied, the case is still pending. Similar challenges have been tried and rejected in California and Texas. For example, on June 12, 2021, in *Bridges v. Houston Methodist Hospital*, a federal judge sitting in the Southern District of Texas dismissed a lawsuit brought by 117 plaintiff-employees protesting the requirement by their employer that all employees receive the COVID-19 vaccine. Even more recently, on July 30, 2021, in *Frontline v. Wilcox*, the California Central District Court denied an *Ex Parte* Application for Temporary Restraining Order brought by doctoral professors against the University of California Irvine arising from the University of California's COVID-19 Vaccination Program.

Employer-mandated vaccine policies for health care and long-term care facilities are also receiving the support of more than 50 health and medical groups, including the American Medical Association, the American College of Physicians, the American Academy of Pediatrics and the American Public Health Association. The associations issued a **joint statement** on July 26, 2021, calling for all health care and long-term care employers to mandate employees be vaccinated against COVID-19. Though the statement focuses on those employees working in healthcare settings, the overture of the statement can be carried into the general workforce as offices and cities continue to re-open, as the statement also recognized that

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“[e]mployer vaccine mandates are effective and lifesaving.” The joint statement put the onerous on all employers to encourage vaccination as “[t]he health and safety of U.S. workers, families, communities, and the nation depends on it.”

In the wake of support for employer-mandated vaccines, when it comes to employer action to fight the recent surge in COVID-19 cases, the federal government is taking the lead. On July 29, 2021, President Joe Biden announced new requirements for federal employees and onsite federal contractors. The Executive Order from the President has not been published yet, but a FAQ sheet published by the White House highlights additional efforts to stop the spread of COVID-19, which include requiring federal government employees and onsite contractors to attest to their vaccination status. For any federal employee or federal onsite contractor that does not attest to being fully vaccinated, they will be required to: (1) wear a mask; (2) physically distance from all other employees and visitors; (3) comply with weekly to twice weekly screening testing; and (4) be subject to restrictions on official travel. The President is directing his team to apply similar standards to all federal contractors and is encouraging employers across the private sector to follow this model as well.

Some large companies are beginning to follow suit. Google and Facebook, for example, both recently announced that employees must be vaccinated before returning to the office in-person. Similarly, Disney and Tyson Foods have also announced that they will require salaried and non-union employees to be fully vaccinated. Meanwhile, other employers, including Walmart, continue to offer various incentives for employees who are fully vaccinated.

For employers considering whether a vaccine mandate is right for their workforce, there are several considerations that must be weighed before any decisions are made. First, location matters because some states have enacted legislation to prohibit employer vaccine mandates. To date, Arizona, Arkansas, Montana, New Hampshire, North Dakota, Tennessee, and Utah all have some form of employer-mandated vaccine prohibition. However, not every law prohibiting vaccine mandates for COVID-19 applies to every employer in the state, and the laws vary widely. For example, in Montana, employers are prohibited from refusing to employ a person based on their COVID-19 vaccination status, and an individual cannot be required to receive any vaccine whose use is allowed under an EUA or any vaccine undergoing safety trials. There are exemptions for licensed nursing homes, long-term care facilities and assisted living facilities, and an employer is not in violation of the law for recommending employees receive a vaccine. Other states limit the application of the restriction to governmental entities only, such as Utah and Tennessee, and do not apply these restrictions to private employers. The vast majority of states have some pending legislation relating to restrictions on employer mandates and vaccine passports. Since the laws are

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rapidly changing, it is best for employers to consult their Laner Muchin servicing attorney before implementing a vaccine mandate to ensure that they know the laws and restrictions where they operate.

In addition to being an effective tool against fighting the pandemic – and returning workplaces to normal – many employers also believe that a vaccine mandate will give them a competitive edge. Being able to tout to customers and clients that your workforce is fully vaccinated may give those individuals a sense of safety and peace of mind after months of uncertainty and fear. However, practically speaking, the larger the workforce the more unlikely, if not impossible, it will be to achieve a fully vaccinated workforce given the exceptions that must be made to reasonably accommodate individuals who, because of a disability or a sincerely held religious belief, practice or observance, cannot obtain the vaccine.

On a practical level, mandatory vaccination policies will likely have an impact on employee morale, as employees who had previously made the decision not to be vaccinated may feel coerced or threatened into obtaining the vaccine. Some employees who have yet to be vaccinated may be waiting for full FDA approval. If that is the case, again, waiting until a vaccine receives full FDA approval may reduce the risk of morale issues. Further, employers who institute such a policy must be prepared to handle the consequences and fairly administer discipline to employees who continue to refuse vaccination without a medical or religious exemption. What happens, for example, if ten percent of the workforce refuses to be vaccinated, or a key employee?

Employees who lose their jobs based on a refusal to obtain the vaccine may be eligible for unemployment benefits. The question of whether such a refusal would render someone ineligible for unemployment benefits is determined at the state level and may result in different conclusions depending on where the employer is located, as each state has its own standards for eligibility.

When it comes to issues such as worker's compensation, a mandatory vaccination program cuts both ways. Employers who have a fully or close to fully vaccinated workforce are likely in a better position to defend against a claim that an employee contracted COVID-19 at work. On the other hand, a worker's compensation claim could arise out of a situation involving an employee who experienced a severe side effect to the vaccine.

For employers who work with a unionized workforce, the decision as to whether to mandate the COVID-19 vaccine is not theirs alone because such a vaccine requirement would be a mandatory subject of bargaining. The effects of a mandatory vaccination policy may need to be negotiated as well to the extent the existing collective bargaining agreement does not already address such items.

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Part of the discussion about whether to mandate the vaccine for employees should also include considerations of pay. For example, the Illinois Department of Labor takes the position that, if there is an employer mandate, employees likely must be paid for the time spent being vaccinated and, if testing requirements are imposed for employees who cannot obtain the vaccine for medical or religious reasons, employers may have to cover the cost of testing.

Bottom line, there is no one size fits all approach for every employer but the momentum for mandating vaccines has certainly increased in recent weeks, which may lead to subsequent guidance by federal, state, and local authorities. If you would like to discuss how to navigate these issues in more detail, please contact your Laner Muchin servicing attorney.